WHEN IS AN ACTION COMMENCED SO AS TO STOP THE RUNNING OF THE STATUTE OF LIMITATIONS?

Generally speaking the legislations and adjudications of the several States follow four main classifications, to-wit:

The action is commenced—

1. When the process is served on the defendant.

2. When the summons goes into the hands of the officer for service.

3. When the complaint is filed.

4. When the process is "issued."

Taking them up in order we shall content ourselves with a bare reference to the statutes of the different States, except that under the fourth class (this being the class under which Virginia comes), we shall give a few of the best considered cases. To cite all the decisions would be an affectation of learning, and unnecessarily encumber this paper.

1. When the Process is Served on the Defendant.

In the following named States, suit is commenced when process is served on the defendant: Connecticut,[1] New York,[2] North Dakota,[3] Ohio,[4] South Dakota.[5]

2. When the Summons goes into the Hands of the Officer for Service.

In the States mentioned below, suit is regarded as commenced when the summons goes into the hands of the officer for service.

It will suffice to quote the statutes of the States that adopt this rule, since they indicate so clearly the time when the action is commenced that it is unnecessary to dwell upon them or to discuss any cases decided under them.

Iowa.[6]—"*The delivery of the original notice to the sheriff* of the proper county, with intent that it be served immediately, which intent shall be presumed unless the contrary appear, *or the actual service of that notice by another person, is a commencement of the action.*"

[1] Perkins *v.* Perkins, 18 Am. Dec. 120.
[2] Code Civil Proc., secs. 398 and 416.
[3] Comp. Laws of Dakota (1887), sec. 4892.
[4] Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140.
[5] Comp. Laws of Dakota (1887), sec. 4892.
[6] Sec. 2532 of the Code.

Florida.[7]—"An action is deemed to be commenced when the summons or other original process *is delivered to the proper officer to be served.*"

South Carolina.[8]—"An attempt to commence an action by *delivering the summons to the sheriff,* with the intent that it shall be actually served, is deemed equivalent to the commencement of the action."

Wisconsin.[9]—"An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, where the *summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer* of the county in which the defendants, or one of them, usually or last resided."[10]

3. WHEN THE COMPLAINT IS FILED.

In Arizona,[11] California,[12] Georgia,[13] Idaho,[14] Indian Territory,[15] Louisiana,[16] Mississippi,[17] Montana,[18] New Hampshire,[19] Tennessee,[20] Texas,[21] and Utah,[22] suit is commenced when the complaint is filed.

4. WHEN THE PROCESS IS ISSUED.

As already indicated, in a number of other States, suit is 'commenced' when the process is 'issued.' The question here is, What is the meaning of the term *"issued"?* Is the action commenced by the clerk's filling up the summons on the order of the plaintiff, or is it commenced by delivering the writ to the sheriff to be served? This is wholly a matter of judicial construction. However, the process may be said to 'issue,' when, at the instance of the plaintiff, it is sued out, or filled up by the clerk, with the intention that it is to be retained by him to be unconditionally served.

[7] Sec. 1282 of ch. 26, Art. 1, of the Code.

[8] Sec. 120 of the Code.

[9] Sec. 7 of the Rev. St.

[10] See Michigan *v.* Eldred, 130 U. S. 693, where, under this statute, Mr. Justice Gray practically held an action to commence when the clerk filled up the summons.

[11] Code Civil Proc. sec. 1.

[12] Code Civil Proc. sec. 405; Allen *v.* Marshall, 34 Cal. 165; Nash *v.* El Dorado Co., 24 Fed. 252.

[13] Code (1882), sec. 3333.

[14] Code Civil Proc. sec. 4068.

[15] Rev. St. U. S., ch. on Indian Territory.

[16] Louisiana Code Proc. Art. 170.

[17] Rev. Code (1880), sec. 1522; Bacon *v.* Gardner, 23 Miss. 60.

[18] Code Civil Proc. sec. 66.

[19] Clark *v.* Slayton, 1 Atl. 113, 63 N. H. 402.

[20] Collins *v.* Insurance Co., 19 S. W. 525.

[21] Sayles' Texas Civil St., Art. 1181; Gulf *v.* Flatt (1896), 36 S. W. 1029; Belton *v.* Sterling (1899), 50 S. W. 1027.

[22] Code Civil Proc. sec. 262; Needham *v.* Salt Lake City (1891), 26 Pac. 920; Keyser *v.* Pollock (1899), 59 Pac. 87.

EXCEPTIONAL CASES.

Before going into this class of cases we must first dismiss from consideration the following classes of exceptional cases, which have caused much confusion among the authorities, which are also prolific producers of *dicta,* and in which the subject of our discussion is not made the point at issue, and therefore do not concern us here. They are as follows:

(*a*). Where the writ is delivered to the plaintiff who *retains it in his own hands.*[23]

(*b*). Where the failure of the action is due to the *default, wrong, or laches of the plaintiff.*[24]

(*c*). Where a petition if filed, but no summons is issued because of *failure to give a cost bond.*[25]

(*d*). Where the petition is filed, with *instructions to the clerk not to issue summons until the happening of a certain event.*[26]

The soundness of these cases is not to be doubted, because it either expressly or impliedly appears in each of them that the plaintiff did not wish or intend to have the summons served at once, unconditionally. The intention and act must concur. "It is the intention and act combined which in fact constitutes the commencement of the suit; because a writ, filled up with no intention of service, is altogether inoperative, as it may be filled up before the cause of action is commenced, or be antedated." A mere passive after-intention to have the writ served would not suffice to arrest the statute, for the law presumes that the plaintiff did not intend to have the process served, and therefore the burden would be on him to show when his intention became fixed by some overt act; as by having the writ served, or at least putting it in the proper legal channel for service, that is, by delivering it to the officer. So, of course, in these cases it is held that the writ must be served, or delivered to the sheriff, before the suit is commenced, and that the statute would not cease to run from the date of petition or issuance as in other cases.

These cases grew out of the language used in the two old New

[23] Whitaker *v.* Turnbull, 18 N. J. L. 172; Lynch *v.* New York (N. J.), 30 Atl. 187; Ross *v.* Luther (N. Y.), 4 Cowen 158, 15 Am. Dec. 341; Burdock *v.* Green (N. Y.), 18 Johns. 14; Wilkins *v.* Worthen (Ark.), 36 S. W. 21; Visscher *v.* Ganaevoor (N. Y.), 18 Johns. 496.

[24] West *v.* Engles (Ala.), 14 South. 333.

[25] Webster *v.* Sharpe (N. C.), 21 S. E. 912; Goldstein *v.* Gans (Tex.), 32 S. W. 185.

[26] Bates *v.* Smith (Tex.), 16 S. W. 47.

York cases of *Burdock* v. *Green*,[27] and *Ross* v. *Luther*,[28] to the effect that the mere filling up of the process by the clerk, without giving it or sending it to the sheriff, is not such an issuance of the writ as to constitute the commencement of the action. The facts in neither of them call for the language used, of for a decision of the point at issue here. They both come properly under the first class of exceptional cases. The first case was one in which the writ was delivered to the plaintiff with directions *not to deliver it to the sheriff before a certain time.* It also appears that the writ was sued out at a time when the plaintiff did not have title to the promissory note sued on, nor the right to institute action thereon. The second also was a case in which the writ was *issued conditionally.* The writ was left with one Skinner, a clerk in the office of the plaintiff's attorney, to be delivered to the coroner "when he could ascertain that the defendant was off the limits." It was committed to Skinner to exercise his discretion. There was not, then, an absolute intention, that the writ should be delivered to the coroner in the first instance.

In every one of the exceptional cases it will be seen that the *dictum* found in these two ancient cases is quoted, or that these cases are cited with approval, or that the cases cited cite and follow them. It is a fact also that the text-books that lay down this *dictum* as a broad principle of law, invariably cite these two cases to sustain them. In some, these only are cited, in others, these and others based on them, are cited.

Having stated the rule that should govern the cases under this head, and classified the cases that are not in point, and traced their origin, we come now to the examination of the authorities, under our fourth class.

UNITED STATES SUPREME COURT.

Mr. Justice Gray, in *Michigan Insurance Bank* v. *Eldred*,[29] said:

"In the case at bar, the testimony introduced by the plaintiff tended to show that the attorney filled out the *praecipe* to the clerk to issue the summons and filed the *praecipe* with the clerk on May 11, 1872, and immediately went to the marshal's office, one story above, in the same building, and told him there was in the clerk's office a summons in the case for service. The summons *issued by the clerk bore date of the same day.* The clerk testified that he presumed that the summons must have been *made*

[27] *Supra*, decided in 1820.

[28] *Supra*, decided in 1825.

[29] 130 U. S. 693 (1889), on appeal from the Circuit Court for the Eastern District of Wisconsin.

out on the day of its date, and knew nothing to the contrary; that *his custom was to issue the summons on the same day the praecipe was filed*, and he had no recollection about this particular summons. He also testified that there was a box on a book-case near the door in the office, where he usually placed such writs as were waiting for the marshal, so that he could stop in, open the door, and get them and take them up, and he usually stopped on his way up and down stairs and got such writs; and that *the practice of the clerk's office was to put the writs in that box for the marshal on the day on which they were issued*, but the clerk sometimes delivered process to the attorney to take to the marshal, and sometimes, if the marshal did not come down immediately, took them up to him.

"The statute of Wisconsin upon this subject . . . [provides that] 'an action shall be deemed commenced as to each defendant, when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, *where the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer* of the county in which the defendants, or one of them, usually or last resided.' (Italics ours.) . . . . .

"In order to come within the second sentence of this section, requiring the summons to be 'delivered, with the intent that is shall be actually served, to the sheriff or other proper officer,' it does not appear to us to be necessary that there should be a manual delivery of the summons to the officer in person. It would be sufficient, for instance, if the attorney left it on the marshal's desk or other place in the marshal's office, so that the marshal would understand that it was left with him for service. It would be equally sufficient if the attorney, or the clerk acting by his direction, placed the summons in the box in the clerk's office, designated by the marshal, with the clerk's assent, as a place where process to be served by him should be deposited, and from which he usually took them daily."

The time when Mr. Justice Gray thinks the writ is *issued* is very clearly shown from the sense in which he uses the word in the following language: First, "The summons issued by the clerk bore date of the same day." This shows clearly that he used the word "issue" in the sense of "filling up," for otherwise, how could it appear to bear date of the day on which it was issued? Second, "The practice of the clerk's office was to put the writs in the box for the marshal on the day on which they were issued." Here he does not say that the putting of the writ into the box *constituted* the issuance, but that the writ was put in the box on the same day that it was issued—or filled up by the clerk. The language contemplates that the issuance was complete at a time before it was put into the box. It will be observed, however, that in this case it is not shown, as a matter of fact, that the writ was ever put in the box, and that

Mr. Justice Gray in order to reach the desired conclusion was forced, under the statute, to treat the writ as constructively delivered to the sheriff. His decision shows that the tendency of the courts is to adhere to the more convenient and just doctrine that the filling up of the writ alone, without delivery to the sheriff, is the issuance of a writ, and how far they will go towards construing away even so strong and explicit a statute as the one above quoted, when it stands in the way of justice.

ALABAMA.

"The *suing out* of the summons is the commencement of the suit . . ."[30]

ARKANSAS.

"A civil action is commenced by filing in the clerk's office a complaint, and causing a summons *to be issued* thereon."[31]

COLORADO.

"Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the *issuing* of a summons thereon."[32]

DELAWARE.

In Delaware the action is probably commenced when the writ is issued.[33]

DISTRICT OF COLUMBIA.

"The action is deemed to be commenced from the time of the *issuing* of the summons."[34]

ILLINOIS.

Where the process was *issued* the day before the limitation expired, and though the record was silent as to when the sheriff received it, it was held that the action was barred.[35]

INDIANA.

"An action is commenced from the time of *issuing* the summons."[36]

KANSAS.

"An action is commenced by the filing of a petition, and causing a summons to be *issued* thereon."[37]

[30] Code, sec. 2619.
[31] Digest of Statutes (1884), sec. 4967.
[32] Civil Code of Colorado, sec. 29.
[33] Laws of Delaware (Rev. Code 1893), tit. 6, sec. 1.
[34] Rev. Code (D. C.), 1857, ch. 81, sec. 1.
[35] Helka Insurance Company *v.* Schroeder, 9 Ill. App. 472.
[36] Rev. Statutes of Indiana (1888), sec. 314.
[37] Gen. St. (1889), par. 4136.

KENTUCKY.

"An action is commenced by filing a petition and causing a summons to be *issued* . . ."[38]

Where, contrary to section 44 of the Civil Code of Kentucky, providing that "the summons shall be returnable to the first day of the next term of the court which does not begin within ten days from the date of the summons," a summons cited the appellant to appear at the next term of the court, which commenced within ten days from the date of the summons, it was said by Judge Bennett: "Where the plaintiff has filed his petition setting forth his cause of action, and has caused a summons to be *issued* thereon in time to save his right of action, he has done all the law requires him to do, for it is the official duty of the clerk to issue the summons in accordance with law, and it is not incumbent upon the plaintiff to see that he issues it in accordance with law."[39]

This language was quoted with approval by Judge Burnam in *Ry. Co. v. Bowen,*[40] where the clerk filled up the writ in the name of D. C. "Brown" instead of the correct name D. C. "Bowen."

See also *Blackburn* v. *City of Louisville,*[41] where it appeared from the evidence that the petition was filed and *"the summons was issued,"* but it was not shown that the summons *was delivered to the sheriff.* Held, that the statute of limitations was suspended. Burnam, J., again quoted the above language, "when the plaintiff has filed his petition, setting forth his cause of action, and has caused a summons to be issued thereon in time to save his right of action, he has done all the law requires him to do."

MAINE.

"All civil actions, except *scire facias* and other special writs, are commenced by original writs."[42]

Apparently the only case that has arisen under this statute is that of *Johnson* v. *Farwell,*[43] where it was decided, in effect, that the suit was commenced when the writ was issued; but at what time the writ issued was not decided, as it was filled up and delivered to the officer the same day.

[38] Civil Code of Kentucky, sec. 39.
[39] Louisville & N. Ry. *v.* Smith (1888), 9 S. W. 493.
[40] (1897) 39 S. W. 31.
[41] (1900) 55 S. W. 1075.
[42] Rev. St. (1883), ch. 81, sec. 1.
[43] 22 Am. Dec. 203.

MASSACHUSETTS.

The action is deemed to have been commenced on the day of the date of the writ.[44]

MICHIGAN.

The date of the writ is *prima facie* evidence of the time of its issue.[45]

MISSOURI.

"The filing of a petition in a court of record, or a statement or account before a court not of record, and the *suing out* of process therein, shall be taken and deemed the commencement of a suit."[46]

NEBRASKA.

"An action shall be deemed commenced . . . at the date of the summons which is served on him."[47]

NEVADA.

"Civil actions are commenced by the filing of a complaint with the clerk of the court, and *issuance of a summons thereon.*"[48]

NEW JERSEY.

Where the summons was prepared and sealed by an attorney in his own office, acting, as is usually the practice in New Jersey, as agent or deputy of the clerk, in good faith, for the purpose of being served or proceeded on within the statutory period, but it was suffered to remain on his table without being given to the sheriff within such period, it was said by Judge Bedle:

"If the summons in this case had been obtained by the attorney, from the clerk's office, there would have been no doubt, under our act, that the writ was issued, but the difficulty arises from the fact that he signed and sealed it in his own office and kept it there. The habit of attorneys, as agents of the clerks, issuing writs, has been so long followed and recognized in the daily practice of the courts, that it ought not now to be suddenly interfered with. It is certainly liable to abuse, yet we must now treat a writ made out by the attorney, the same as if made out by the clerk. . . . . The date of the *teste* must be considered as the commencement of the suit, unless it is untruly made. The issuing of the writ under the act of 1855 contemplates no act outside of the clerk. The dating and the isuing are necessarily contemporaneous, and each is the act of the clerk. He issues the writ and puts in the date he does it. . . . If the clerk

[44] Gardner *v.* Webber (1835), 17 Pick. 407; Farrell *v.* German-Am. Ins. Co. (1900), 56 N. E. 572.

[45] Howell *v.* Shepard, 48 Mich. 472.

[46] Wagner's Rev. St., sec. 2013.

[47] Nebraska Code, sec. 19.

[48] Code of Civil Proc., sec. 22.

signs, seals and conpletes it, it is a perfect writ, ready for service, so far as his duties are concerned, for a suitor who intends it to be served or proceeded on. *The writ is issued under the act, whether it has actually been delivered to the party or remains in the clerk's office awaiting the delivery to the party, his attorney, or the sheriff.*"[49]

Elmer, J., dissented, but as it was on the point that the attorney acted as agent for the clerk, it does not concern us here.

In this case even a constructive delivery to the sheriff could not be claimed, as it was not filled up by the clerk or in his office.

NORTH CAROLINA.

"The action is commenced as to each defendant when the summons is *issued against him.*"[50]

In the case of *Houston* v. *Thornton,*[51] it is held under the above statute that to "issue" the writ it must leave the clerk's hands. This is believed to be the only one of the cases, in which the point was directly raised, that takes this view of the meaning of "issue," and this can be explained by the fact that the case is decided on the ground that the former case of *Webster* v. *Sharpe,*[52] decided in that State, settled the law to the effect that the writ must be delivered to the sheriff. As a matter of fact, however, the ruling of the judge on that point in *Webster* v. *Sharpe* was mere *dictum,* since in that case the summons could not have been delivered at once because of a failure to give a cost bond which was a condition precedent to the delivery of the writ. Thus it will be seen that this, the only case holding that the words "to issue" mean "to deliver to the sheriff," is based upon *dictum* pure and simple; and, an examination of *Webster* v. *Sharpe* will show that the *dictum* there uttered is based on *dicta* in the cases of *Burdock* v. *Green* and *Ross* v. *Luther,* referred to above.*

OKLAHOMA.

"An action is commenced, within the meaning of the statute of limitations, at the *date of the summons,* which is served on the defendant."[53]

RHODE ISLAND.

Issuing a writ is the commencement of a suit at law if such

[49] Updike *v.* Ten Broeck (1866), 32 N. J. L. 105.
[50] Code of N. Car., sec. 161.
[51] (1898) 29 S. E. 827.
[52] 21 S. E. 912.
[53] Code Civil Proc., sec. 20.

[* In McClure *v.* Fellows (N. C.), 42 S. E. 951, decided since this paper was prepared, the case of Houston *v.* Thornton is affirmed after full consideration. Clark, J., dissenting.—EDITOR VA. LAW REGISTER.]

issuing be made with absolute and honest intention of having service made.[54]

VERMONT.

The time of the commencement of a suit to avoid the statute of limitations is the day when the writ is *issued.*[55]

VIRGINIA.

"The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk."[56]

The question as to when a writ may be said to 'issue' under this statute has not been directly raised, but from the language used by Judge Cardwell, in *Noell* v. *Noell,*[57] by Mr. Minor,[58] and by the West Virginia court in construing a statute, identical with ours,[59] the *filling up* of the summons by the clerk, and not the *delivery to the sheriff,* is unquestionably the *'issuance'* of the writ in this State.

Judge Cardwell said: *"The suing out of the writ is the commencement of the action at law and this ascertained prima facie by attestation of the clerk; but the real time of issuing may be shown in evidence.* Joynes, Lim. 189, 190 and cases cited."

By this last clause, "but the real time of issuing may be shown in evidence," Judge Cardwell evidently means that oral testimony, or extrinsic evidence, may be produced to show that as a matter of fact the writ was not filled up on the day it bears date, for in *Bronson* v. *Earle,*[60] where the presumption was that the date of the writ was the true time when the action was brought, it was said: "This presumption may always be rebutted, and the true time settled by actual proof of the fact. The date is not conclusive, and if the writ is antedated, the defendant will be allowed to show the time when it was actually issued."[61]

It will be further observed that Judge Cardwell used the words *"sued out"* and *"issued"* synonomously. The same occurs in *Va. Fire and Marine Ins. Co.* v. *Vaughan,*[62] where it is said: "The original summons to commence the action was *sued out* on the 29th

[54] Cross v. Barber (1888), 15 Atl. 69.
[55] Hall v. Peck, 10 Vt. 474.
[56] Sec. 3223, Code of Virginia.
[57] 93 Va. 433.
[58] 4 Minor's Inst. 985.
[59] Quoted below.
[60] 17 Johns. 65.
[61] The same is quoted with approval in Johnson v. Farwell (Me.), 22 Am. Dec. 203.
[62] 88 Va. 832.

of March . . . The commencement of the action was the *issuance* of the original summons."

In Graves' Notes on Pleading, it is said that "the action is begun as soon as the plaintiff *sues out* the writ; and this although the writ is not delivered to the officer, nor served on the defendant, until some time after the date, and though no reason is shown for the delay."

Mr. Minor[63] says: "If within the year an execution issues (*by which is understood its being made out and signed by the clerk, ready for the sheriff*), other executions on the same judgment may be issued without *scire facias;*" and[64] that "if it be issued before the party's death, *although it be not in the officer's hands,* it may be levied after his death."

Now seeing that the word *issue* is used interchangeably with *sued out* and that the words *sued out* are used in the sense of *filling up,* it can scarcely be doubted that in Virginia the *issuing* of the process means merely the *filling up* of the process by the clerk, in readiness for the sheriff, without reference to when it is actually delivered to that officer.

WEST VIRGINIA.

The provisions of the West Virginia Code[65] are identical with those of section 3223 of Virginia Code.

In a recent case[66] Brannon, J., says:

"Mr. Hogg, in his valuable and greatly improved second edition of Hogg's Pleading and Forms [sec. 1], takes the position that under that statute all actions which are commenced by summons date their commencement at the date of the summons. His position is evidently correct. It applies alike to suits in chancery and actions at law. When a party against whom the statute of limitations is running has the clerk to issue a summons against the defendant, he has set in motion the wheel of the law, and done all that could be required of him as a mere commencement of his action. . . . The suit has come into being by the issue of the summons. The plaintiff has appealed to the law for the redress of his grievances. This construction relieves all uncertainty as to when the process goes into the hands of the officer, or whether the suit has been *bona fide* commenced, or other questions that might arise were a different rule to prevail." [67]

WYOMING.

"An action is deemed commenced at the *date* of the summons which is served on the defendant.[68]

[63] *Ubi supra.*
[64] Id. 1025.
[65] Sec. 5 of ch. 124.
[66] Sec. 1.
[67] Larrence v. Winifrede Coal Co. (1900), 35 S. E. 925.
[68] Rev. St., sec. 2376.

THE WRIT NEED NOT BE DELIVERED.

At first blush, the cases apparently furnish a great diversity of opinion as to when a writ is to be deemed 'issued' under the statute of limitations, so as to stop the running of the statute. A close examination of the cases and statutes shows that the decision in every case, where the point is squarely raised, except one,[69] is that the *filling up of the writ* by the clerk alone, without any delivery to an officer, is the commencement of the action, and that its date is *prima facie* evidence of the true date on which it was actually filled up.

There seems to be no reason for requiring the writ to be received by the sheriff in order to constitute the commencement of an action. If it be to avoid contingencies, this would be ineffectual, since the commencement may still depend on contingencies wholly independent of the plaintiff, such as the sheriff's occasional absence, his sickness, or his want of official qualifications. If it be to insure notice to the defendant, why not hold the plaintiff responsible for the actual *service* of the writ on the defendant? It seems more reasonable to hold that when the plaintiff has filed his petition setting forth his cause for action, and has caused a summons to be filled up in time to save the right of action, he has done all that the law can consistently require him to do. It is the official duty of the clerk to deliver the summons to the proper officer, in accordance with law, and it is not incumbent upon the plaintiff to see that he delivers it in accordance with law. On the contrary, he has the right to repose entire confidence in the clerk's not only knowing his duty but in his doing it. For the non-delivery of the writ the plaintiff is not guilty of the laches that is contemplated by the statute of limitations in order to deprive him of his remedy, because it is caused by the act of the clerk, who is officially bound to act according to law, in the interest of both plaintiff and defendant. The laches of the clerk cannot be imputed to the plaintiff, for in so far as he may be treated as an agent, he is equally the agent of both plaintiff and defendant.

In the light of the foregoing, we may say with some confidence, that the process is issued when, at the instance of the plaintiff, it is sued out, or filled up, by the clerk, with the intention that it is to be retained by him to be unconditionally served.

[69] The poorly considered North Carolina case of Houston v. Thornton, 29 S. E. 827, commented on above.

We have already dealt[70] with the exceptional cases where plaintiff is himself in default, as where he retains the writ in his own hands, or directs that it be not served, etc.

University of Virginia. GEORGE C. GREGORY.

[70] *Ante* p. 626.